deemed to be used for hire or reward (except by virtue of the presumption under section 144(a) of the Road Traffic Ordinance) where it could be reasonably inferred from the evidence that the driver never intended to charge a fare. The correct test to be applied is not whether the passengers had the intention to pay but whether the driver had the intention to charge a fare. This is the principle enunciated in *Din* v. *Public Prosecutor* (2) where the headnote reads:—

"The test is whether the accused intended to accept from the passengers a payment which he expected to be tendered when he had given them the ride."

In the instant case, the two constables, according to their evidence, were given the impression at the commencement of the journey that they would be given a free lift. There is nothing in the evidence to suggest that subsequently they had any reason to change that impression. All the circumstances of the case coupled with the 2nd appellant's evidence are, in my opinion, of sufficient weight to rebut the presumption that the passengers were carried for hire or reward.

The conviction and sentence is hereby set aside and the appellants are acquitted. The order confiscating the car is also set aside and I order that the car be released to the 1st appellant.

Appeal allowed.

C.D. v. COMPTROLLER OF INCOME TAX

[A.C.J. (Gill J.) June 10, 1967]

[K.L. — Civil Appeal No. 30 of 1967]

Income tax — Trustee — Remuneration payable to, under a will — Whether subject to payment of income tax — Earned income — Profit from property — Income Tax Ordinance, 1947, s. 10(1).

The appellant was appointed as an executor and trustee of the estate of *ETS* decd. under a will. The direction under clause 4 of the will was as follows: "I direct that my trustees shall be entitled to receive a remuneration of 5% in respect of their time and trouble in acting as such trustees, such remuneration to be calculated on the gross amount of all assets received by them." Although the will provided for a lump sum as remuneration for the trustees, the appellant in fact took his remuneration from time to time over a period of years. In respect of the remuneration which he received for each year after the coming into force on August 1, 1948 of the Income Tax Ordinance, he was assessed for income tax. His appeal to the Board of Review against such assessment having been dismissed, he then appealed to the High Court.

Held: the payments to the appellant arose out of the performance of his duties as trustee and are earned income in the sense that they are the product of his employment as trustee. Alternatively, the remuneration which he received was profit from property in the sense of his right to a payment of money, and thus liable to income tax.

Cases referred to:—

(1) *Re Thorley* [1891] 2 Ch. 613.

(2) *Dale & Ors.* v. *Inland Revenue Commissioners* [1951] 2 All E.R. 517, 519.

(3) *Dale & Ors.* v. *Inland Revenue Commissioners* [1952] 2 All E.R. 89.

(4) *Dale & Ors.* v. *Inland Revenue Commissioners* [1954] A.C. 11.

(5) *Partridge* v. *Mallandaine* (1886), 18 Q.B.D. 276, 277 and 278.

(6) *MacMillan* v. *Guest* [1942] A.C. 561, 566.

CIVIL APPEAL.

M. Shankar and *K. A. Menon* for the appellant.

Cur. Adv. Vult.

Wan Hamzah bin Wan Mohamed Salleh (Federal Counsel) for the respondent.

Gill J.: The appellant in this case was appointed as an executor and trustee of the estate of Eu Tong Sen deceased by a will dated the 16th day of September, 1933. Clause 4 of the said will provided as follows:—

"I direct that my trustees shall be entitled to receive a remuneration of 5% in respect of their time and trouble in acting as such trustees, such remuneration to be calculated on the gross amount of all assets received by them."

The deceased died in 1941. Although the will provided for a lump sum as remuneration for the trustees, the appellant in fact took his remuneration from time to time over a period of years. In respect of the remuneration which he received for each year after the coming into force on 1st August, 1948 of the Income Tax Ordinance, 1947, he was assessed for income tax. He appealed against such assessment by the Comptroller of Income Tax to the Board of Review. The Board of Review dismissed his appeal. Against that dismissal of his appeal he has now appealed to this court.

The point to be decided in this appeal, as it was in the appeal before the Board of Review, is whether a remuneration payable to a trustee under a will is subject to payment of income tax. It is common ground that for such remuneration to be liable to payment of income tax it must come within the provision of section 10(1) of the Income Tax Ordinance, 1947, the relevant portion of which reads as follows:—

"Income tax shall, subject to the provisions of this Ordinance, be payable at the rate or rates specified hereinafter for each year of assessment upon the income of any person accruing in or derived from the States of Malaya or received in the States of Malaya from outside the States of Malaya in respect of —

x x x x x

(b) gains or profits from any employment;

x x x x x

(f) rents, royalties, premiums and any other profits arising from property."

In *Re Thorley* (1) it was decided that a bequest to a trustee of so much a year on condition that he performed the duties of a trustee was a gift on a condition. In *Dale & Ors.* v. *Inland Revenue Commissioner,* (2) where the testator

had bequeathed £1,000 a year to each of the trustees of his will "so long as he shall continue to act as trustee", Harman J. said of the decision in *Re Thorley*:—[1]

"That I accept but how that carries the matter any further I am unable to see. If the gift be made on a condition that certain work is done, the money given is clearly remuneration for the work, and the fact that it is also a legacy seems to me to have nothing to do with the point."

His Lordship went on to hold that the trustee appointed under the will was the holder of an office of trustee and that the annuity paid to him was remuneration from that office and so was earned income within the meaning of section 14(3) of the Income Tax Act, 1918 which reads as follows:—

"For the purposes of this section the expression 'earned income' means —

(a) any income arising in respect of any remuneration from any office or employment of profit held by the individual . . .

(b) any income from any property which is attached to or forms part of the emoluments of any office or employment of profit held by the individual.

The decision of Harman J. in *Dale's* case was reversed by the Court of Appeal [3] but restored by the House of Lords.[4] In the House of Lords, Lord Normand said (at pages 27 and 28):—

"I think there is confusion here between the source of the payment, which is the testator's bounty as expressed in his will, and the quality of the payment as earned or not earned. There need be no incompatibility in saying that the income is the conditional gift of the testator but that it has to be earned by compliance with the testator's condition of serving as a trustee.

I would observe more generally that the question whether income is earned or not is a question which arises between the trustee and the Inland Revenue, and it has no relation either to the legal duty which a trustee owes to the trust and the beneficiaries, or to the legal conception that such a payment as that under consideration derives from a testator and can be regarded as a legacy. The source of the sum and its character as a receipt in the hands of the trustee are two separate and unconnected things."

His Lordship went on to indicate that, so long as the trustee was in fact continuing to act as a trustee, it was not relevant to consider the amount of work which he had to do or the value of his services. It was sufficient that he complied with the condition of continuing to act as a trustee. In other words, it has to be determined whether the remuneration is earned as a reward for services.

The main ground of appeal is that the lump sum remuneration payable to the appellant is not chargeable to income tax, because such remuneration is payable to him as the holder of the "office" of trusteeship under the will and not by reason of his "employment" as trustee. It is argued that the appellant holds an office but is not employed as there is no employer, he himself being the legal owner of the trust funds from which he takes his remuneration merely by appropriating some part of the estate to himself in accordance with the provisions of the will under which he is beneficiary in respect of his remuneration. In other words, it is contended that there is no relationship of employer and employee between him and some other person. It is further argued that, as section 10(1)(b) of the Income Tax Ordinance, 1947 does not contain the word "office", the decision in *Dale's* case is wholly inapplicable here. I do not agree. To use the words of Denman J. in *Partridge* v. *Mallandaine*,[5]

"I am not disposed to put so limited a construction on the word 'employment' as that suggested in argument. I do not think that employment means only where one man is set to work by others to earn money; a man may employ himself so as to earn profits in many ways."

For example, a man may be the manager of a firm of which he is the sole proprietor. As such manager he may pay himself a yearly salary. In addition to his salary, of course, there may be his profits from his business at the end of the year. Will it be wrong to say that he derives his income by way of salary from employment even though he is his own employer? I do not think so. In my opinion, the word "employment" is sufficiently wide to include within its meaning the holding of an office. In *MacMillan* v. *Guest* [6] Lord Wright said: "The word 'employment', in my opinion, has to be construed with and takes its colour from the word 'office'."

Assuming that I am wrong in holding that the appellant is liable to pay income tax under section 10(1)(b) of the Income Tax Ordinance, 1947, the next question which I have to consider is whether he is liable to pay under section 10(1)(f). It is clear from clause 4 of the will that the appellant has a right to receive a remuneration from the estate. Whether that remuneration is to be paid out of the income from the estate or from the gross amount of all the assets received by the trustees is immaterial. What is important is to look at the character of the remuneration while in the hands of the person who received it. Quite clearly this remuneration in the hands of the appellant is a profit. His right to receive remuneration from the estate must be regarded as property because every right to receive money or property is property. The remuneration which he receives from the estate by virtue of that right is therefore profit from property and thus liable to income tax under section 10(1)(f).

In the final analysis the point to be decided in this appeal is an extremely short one and is not susceptible of any great elaboration. The payments to the appellant arise out of the performance of his duties as trustee and are earned income in the sense that they are the product of his employment as trustee. The fact that he is his own employer does not mean that he does

not employ himself in carrying out his duties in respect of which he receives payment. Alternatively, the remuneration which he receives is profit from property in the sense of his right to a payment of money.

For the reasons I have stated the Board of Review, in my opinion, were quite right in dismissing the appeal. I would therefore dismiss this appeal with costs.

Appeal dismissed.

TAN SIEW ENG & ORS. v. CHANG KUI MOI & ORS.

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Pike C.J. (Borneo)) June 13, 1967]

[Kuching — Federal Court Civil Appeal No. X. 3 of 1967]

Landlord and Tenant — Sub-tenancy — Sub-lease — Assignment by sub-tenant — No permission of landlord — Land Code (Sarawak Cap. 81), ss. 119 & 161 — Rent Control Ordinance (Cap. 86) s. 5.

Practice and Procedure — Decisions on preliminary points of law — Tendency of counsel to request or agree to hearing.

PL was a sub-tenant of the 1st appellant and had occupied the premises in question for some 16 years. The ownership of the building of which *PL's* premises formed part changed hands and the new owner wished to have vacant possession of the ground floor and to this end negotiated with *PL* to obtain vacant possession by the end of 1965. This *PL* agreed to do for a consideration of $12,500 and this was achieved by what had been described as an assignment of his monthly tenancy.

The only issue before the High Court was: "Was the assignment of *PL's* sub-tenancy valid without consent?" and the learned judge found on the evidence that *PL* never contracted or promised or agreed not to sub-let or assign without prior agreement of the 1st appellant, consequently no express consent of the 1st appellant was necessary to make valid *PL's* agreement to assign for value his interest to the respondent on the ground that the tenancy was a monthly one. He also held that the transfer was not illegal or invalid by reason of its non-registration under section 119 of the Land Code or by reason or section 5 of the Control of Rent Ordinance. On appeal,

Held (Pike C.J. (Borneo) dissenting): (1) since the Land Code specially exempted a sub-lease or an agreement for a sub-lease for a period not exceeding a year, from registration, it is only a sensible interpretation of the intention of the legislature that a dealing in reference to such a lease or agreement for a lease should also be exempted. The reason for exempting a sub-lease or an agreement for a sub-lease for a term not exceeding a year from registration is for the convenience of the people. It follows therefore, for the convenience of the people the law should be interpreted so that an assignment or dealing with such a sub-lease should also be exempted from registration;

(2) in the circumstances of the case although the respondent paid the sum of money to *PL*, that itself, did not disable him from asserting his right which he had under the sub-tenancy.

Cases referred to:—

(1) *Rajbenback* v. *Mamon* [1955] 1 Q.B. 283.

(2) *Tay Thean Poh* v. *Ng Gek Ing* Kuching High Court Case No. A/17/59.

(3) *Bong Kam San* v. *Tan Cheng Chuan* unreported Kuching High Court case.

(4) *R.* v. *Tonbridge Overseers* (1884), 13 Q.B.D. 339, 342.

(5) *Grace Rymer Investment Ltd.* v. *Waite & Ors.* [1958] 1 All E.R. 145.

(6) *Anthony Tan & Anor.* v. *Yong Foh Phin & Anor.* [1960-63] S.C.R. 77.

(7) *Eusof bin Ali & Anor.* v. *Nyonya Lee Gaik Hooi* [1953] M.L.J. 98.

FEDERAL COURT.

S. K. T. Yong for the appellants.

K. H. Ong for the respondents.

Cur. Adv. Vult.

Barakbah L.P.: I have had the advantage of reading the judgments of Azmi, Chief Justice, Malaya and Pike, Chief Justice, Borneo. With due respect I agree with the views expressed by the former, but by a different course of reasoning.

The main grounds of appeal are:—

(a) that under the law of Sarawak an assignment of an interest in land cannot be by parol and that the instrument Ex. 12 if it is to be regarded as an instrument of assignment is, under section 119 of the Land Code, ineffectual because unregistered; and

(b) that the transaction of assignment is unenforceable because tainted with illegality.

With regard to ground (a) the relevant sections of the Sarawak Land Code applicable are sections 119(1), 137(1), 139(1), 158 and 161. They read as follows:—

"119. (1) No instrument shall be effectual to pass any land or any interest therein, or render any land liable as security for the payment of money, until it has been registered in accordance with this Part.

137. (1) When any land or any estate or interest therein is intended to be transferred, the transferor and transferee shall execute for the purpose of registration a memorandum of transfer in Form G in the First Schedule, which memorandum shall give such description of the land as may be necessary, shall refer to the entry in the Register relating thereto and shall contain a precise statement of the estate or interest intended to be transferred. Every transfer shall be subject to the provisions of section 31.

139. (1) A registered charge or sub-lease may be transferred by a memorandum of transfer in Form G in the First Schedule.

158. When any land is intended to be sub-leased for any term exceeding one year, the proprietor and the sub-lessee shall execute for the purpose of registration a memorandum of sub-lease in Form L in the First Schedule, which memorandum shall give such description of the land as may be necessary to identify the same and shall refer to any entry in the Register relating thereto. Any such sub-lease may also include an agreement by the sub-lessee that he will insure and keep the property insured against loss or damages by fire and also such other conditions as may have been agreed to by the parties.

161. Any sub-lease, or agreement for a sub-lease,